

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**COMMENT OF THE OKLAHOMA CORPORATION COMMISSION IN
RESPONSE TO ORDER AND NOTICE OF PROPOSED RULEMAKING
(FCC 04-179)**

I. INTRODUCTION

The Oklahoma Corporation Commission (“Oklahoma Commission”) respectfully submits the following comment for consideration and review by the Federal Communications Commission (“FCC”). This comment is submitted in response to the Order and Notice of Proposed Rulemaking (FCC 04-179). This testimony and evidence are attached as exhibits and appendices.

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III. EXHIBITS AND APPENDICES

Summary of Testimony of Marilyn Anderson	Exhibit 1
Testimony of Marilyn Anderson	Exhibit 2
Summary of Testimony of Barbara Mallet re: Batch Hot Cut	Exhibit 3
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Summary of Testimony of Barbara Mallet re: Dedicated Transport	Exhibit 5
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Summary of Testimony of Lillie Simon	Exhibit 7
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Competition Maps	Appendix A
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IV. REQUEST FOR WAIVER OF FILING REQUIREMENTS

Due to the voluminous nature of the records associated with this Comment and the cost of duplicating that record, the Oklahoma Commission respectfully requests a waiver pursuant to FCC rule 1.3 of the filing requirements in FCC rules 1.51 and 1.419 to allow it to file its *TRO* proceedings' records in CD format only. *Reference:* 47 C.F.R. § 1.3 (2004) and 47 C.F.R. §§ 1.51 and 1.419 (2004). For the same reasons, the Oklahoma Commission requests a waiver of the *Interim Order and NPRM's* ¶3 requirement for commenters to stamp each page of any confidential or proprietary document with the "CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN CC DOCKET NO. 01-338 & WC DOCKET NO. 04-313 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION"; and the filing of redacted forms of the confidential information stamped "REDACTED—FOR PUBLIC CONSUMPTION." (Note: The Oklahoma Commission has labeled each CD containing confidential documents with the foregoing confidential information notice; such CDs contain only confidential documents. The designation of an exhibit as confidential is not an indication that the Oklahoma Commission made a substantive determination that the information contained therein is confidential under state law. With few, if any, exceptions, designating of a document as confidential was done by the offering party and not substantively reviewed by the Oklahoma Commission prior to admission. Redacted confidential documents are saved to CDs clearly labeled as "Non-confidential.") Finally, and also for the same reasons, the Oklahoma Commission requests a waiver of paragraph 33 of the *NPRM* in order to allow it to file its comments using the FCC's ECFS system, but without having to upload and attach all of the documents on the CDs.

Pursuant to FCC rule 1.3, the Commission may waive its rules for good cause. Good cause may be found when special circumstances exist to warrant a deviation from

the general rule, or where circumstances make strict compliance inconsistent with the public interest. *Reference: WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert denied* 409 U.S. 1027 (1972) and *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166. In this matter, good cause exists simply based on the sheer volume, time, and expense involved with submitting the Oklahoma Commission's records in paper format. Moreover, the Oklahoma Commission spent considerable time in compiling the CDs to ensure that they accurately represent the record from the Oklahoma Commission's TRO proceeding. Finally, by allowing the Oklahoma Commission to submit its records on CD, the FCC avoids the prospect of being inundated with such records in piecemeal fashion by the participating parties.

V. PROCEDURAL HISTORY

The Oklahoma Commission began Cause No. PUD 200300646 in response to the FCC's Triennial Review Order. After all parties filed Direct Pre-filed Testimony, but prior to any formal hearing or ruling in the matter, a decision was issued in *United States Telecom Association v. Federal Communications Commission et al.*, an unpublished decision, No. 00-1012 (D.C. Circuit), decided March 2, 2004 ("*USTA II*"). This court decision effectively stayed further action by the Oklahoma Commission.

VI. ANALYSIS

In its Order and Notice of Proposed Rulemaking (FCC 04-179), the FCC established a six-month plan to revise its regulatory framework for unbundling. The FCC took this action in response to the decision in *USTA II*. In addition to the six-month plan, the FCC asked for comment about the unbundling framework that will regulate local competition. *Reference: FCC 04-179*, pages 6 - 9. In its request, the FCC was rather emphatic that comments be supported by relevant factual information. *Reference: FCC 04-179*, page 9.

In this comment, the Oklahoma Commission has included the testimony of qualified experts on Staff. The analysis and data used by the Commission is included within that testimony as well as the various exhibits and appendices. It is important to note that the factual information provided to the Oklahoma Commission by the various parties was often inconsistent or contradictory. During the TRO proceeding (Oklahoma Corporation Commission Cause No. PUD 200300646), the Staff members at the Oklahoma Commission sorted through this morass of data, however, the TRO proceeding was not concluded and the information was never subjected to cross-examination or the scrutiny of a formal hearing on the merits. The FCC should remain cognizant of this lack of finality when making decisions based on the testimony and data offered by the Oklahoma Commission.

A. Regulatory Framework for Unbundling in Light of *USTA II*

“We seek comment on how to respond to the D.C. Circuit’s *USTA II* decision in establishing sustainable new unbundling rules under sections 251(c) and 251(d)(2) of the Act. As an initial matter, we seek comment on the changes to the Commission’s unbundling framework that are necessary, given the guidance of the *USTA II* court.”

Reference: FCC 04-179, para. 9.

Summary: The FCC may develop a sustainable regulatory framework for unbundling in accordance with *USTA II* by making market-specific findings of “impairment”, retaining its decision making authority, and setting impairment standards based on a “granular” analysis.

Analysis: In its attempts to develop a regulatory framework for unbundling, the FCC has struggled with an “impairment” standard that will withstand the scrutiny of the court. This “impairment” standard is the cornerstone on which the entire regulatory framework rests. In the TRO, the FCC made a nationwide finding that competitive local exchange carriers (“CLECs”) are impaired without unbundled access to incumbent local exchange carrier (“ILEC”) switches for the mass market. *Reference:* *USTA II* at 11. In its review of the TRO, the D.C. Circuit held that the FCC could not make a national finding of “impairment” without considering market-specific exceptions. *Reference:* *USTA II* at 20. The court also held that it is unlawful for the FCC to subdelegate its decision-making authority by enlisting state agencies to determine whether local markets are impaired. *Reference:* *USTA II* at 18.

In a round about way, the *USTA II* decision identified the approach that the FCC may adopt to establish a regulatory framework that is consistent with sections 251 (c) and 251(d)(2) and will withstand the scrutiny of the court.

First, the FCC must make market-specific findings of “impairment”. The FCC should not make any blanket, nationwide findings.

Second, the FCC should seek advice and policy recommendations from state commissions when making “impairment” determinations but retain its own decision-making authority. The court explained that the state commissions could not lawfully make an “impairment” determination but that the state commissions could advise the FCC. *Reference:* *USTA II* at 17.

Finally, the court seemed to generally approve of the FCC’s granular approach to making “impairment” determinations but was discouraged that the FCC made “impairment” determinations without sufficient evidence. *Reference:* *USTA II* at 10. The FCC should establish practical methods for gathering information that will provide evidentiary support for “impairment” determinations. State commissions could be helpful in such an endeavor but the FCC would have to specifically define and standardize the

information it wants, the manner in which such information is submitted, and adopt some method to verify the accuracy of the information. The FCC should also establish mathematical formulas or other analytical processes that will clarify the line between “impaired” and “not impaired”.

B. ILEC Service Offerings within the Regulatory Framework for Unbundling

“To that end, we seek comment on how various incumbent LEC service offerings and obligations, such as tariffed offerings and BOC section 271 access obligations, fit into the Commission’s unbundling framework.”

Reference: FCC 04-179, para. 9.

Analysis: There are three tactics that an ILEC can employ to meet its obligations to provide certain services to competitors: tariffed service offerings, negotiated agreements, or a mixture of tariffed service offerings and negotiated agreements.

Tariffed service offerings by ILECs give the Oklahoma Commission more control and oversight over the local market and permit the Oklahoma Commission to consider the customer impact. Negotiated agreements offer the Commission less oversight but serve to promote a more competitive marketplace by allowing the telecommunications carriers to make business decisions with less interference by the Oklahoma Commission. A third approach includes the use of both tariffed service offerings and negotiated agreements. To the extent that carriers cannot negotiate an agreement, the parties may fall back on the tariffed service offering as a baseline for rates, terms, and conditions. Each approach has advantages and disadvantages. The Oklahoma Commission offers no suggestions on which approach should be selected.

C. Relevant Markets and Impairment

“Moreover, we seek comment on how best to define relevant markets (e.g., product markets, geographic markets, customer classes) to develop rules that account for market variability and to conduct the service-specific inquiries to which *USTA II* refers.”

Reference: FCC 04-179, para. 9.

1. Geographic Market Definitions

Analysis: The FCC seeks comment on how to best define geographic markets for “impairment” determinations.

SBC, the dominant ILEC operating in Oklahoma, suggested that the FCC define a geographic market as a Metropolitan Service Area / Wide Area Calling Plan (MSA/WACP). *Reference:* Exhibit 2 Testimony of Marilyn Anderson, page 4, lines 21 – 23.

The Oklahoma Commission’s analysis began with identifying the exchanges where customers were actually being served by CLECs with self-provisioned switches and then plotting the locations on a map. *Reference:* Exhibit 2, Testimony of Marilyn Anderson, page 3, lines 3 – 7. The resulting maps are attached as Appendix A.

The Oklahoma Commission Staff (“Staff”) directly contacted the CLECs that SBC identified as self-provisioned mass-market competitors. *Reference:* Exhibit 2, Testimony of Marilyn Anderson, pages 12 - 13, lines 25 – 26 and 1 – 17, respectively. In some cases, Staff determined that the information provided by SBC was inconsistent with the information provided by the CLECs. *Id.* Pursuant to information provided by CLECs, only SBC and Cox compete for mass market customers in Oklahoma and the competition is limited to densely populated exchanges. *Reference:* Appendix A, Maps.

In Appendix A, two maps are presented for the Oklahoma City MSA/WACP and two for the Tulsa MSA/WACP. The first map illustrates the number of self-provisioned competitors serving the mass market in each exchange *based on the information provided by SBC*. The second map illustrates the number of self-provisioned competitors serving the mass market in each exchange *based on the information provided by CLECs*. The substantial inconsistency between information provided by dominant ILEC and its competitors demonstrates the need for the FCC to incorporate some mechanism to verify the data provided by interested parties.

Based on information submitted by the CLECs, no exchange in Oklahoma had more than one CLEC serving mass market customers with self-provisioned switching. *Reference:* Exhibit 2, Testimony of Marilyn Anderson, page 12, lines 18 –20. Under the standard of “impairment” defined prior to *USTA II*, the mass market in Oklahoma would be “impaired” because the self-provisioning trigger has not been met in any Oklahoma exchange. The Oklahoma Commission is cognizant that the FCC may redefine the self-provisioning trigger in future proceedings.

If the geographic market is defined as a MSA and competition is realized in a single exchange within that MSA, then the entire MSA would be deemed competitive even though the vast majority of mass market customers might have no access to competitors or enjoy the benefits of competition. The first map of the Tulsa MSA in Appendix A is a good illustration. Based the information provided by SBC, Tulsa has one

exchange served by self-provisioned competitors. Because of this, the entire Tulsa MSA would be deemed competitive if the geographic market is defined as an MSA.

On the other hand, if the geographic market is defined at the exchange level and competition is realized within an exchange, the competitive analysis will be performed on a granular level to adequately ensure all mass market customers have access to the benefits of competition. The potential still exists that some customers in a “competitive” exchange would not have access to competitors. For example, if a single exchange is served by two or more central offices and competitors have installed self-provisioned switches in only one of those central offices, all mass-market customers within that exchange would not necessarily enjoy competitive choice. Nevertheless, analysis at a level of detail lower than the exchange level would be administratively prohibitive.

The Oklahoma Commission is aware that some exchanges, particularly those in rural areas, may never see effective wire line competition because the economies of scale are simply not sufficient to encourage CLECs to enter those markets. However, if financial incentives, such as UNE pricing and availability, attract CLECs to underserved markets, the CLECs will first build their customer base then install self-provisioned switches to serve those customers. This approach has the greatest potential to bring competition into non-competitive exchanges. On the other hand, if entire MSAs are deemed competitive simply because CLECs offer service in one densely populated exchange, there will be little incentive to expand the provision of competitive services and ultimately provide facility based competition to less populated exchanges within that MSA.

Facts and Statistics:

There are a total of 531 exchanges within the State of Oklahoma. Four MSAs cover Oklahoma: Enid, Lawton, Oklahoma City, and Tulsa. The dominant ILEC in Oklahoma, SBC, did not consider the Enid and Lawton MSAs competitive at this time, but did seek to declare the Oklahoma City and Tulsa MSAs as competitive.

The study area is based on the Oklahoma City Wide Area Calling Plan (“WACP”). The WACP is almost identical to the MSA. The WACP is slightly smaller than the MSA because a few outlying rural exchanges are not included (7 exchanges in Oklahoma City and 3 exchanges in Tulsa).

Oklahoma City WACP *	ILEC data	CLEC data
Total number of exchanges	46	46
Exchanges with no competitors	32	32
Exchanges with one competitor	7	14
Exchanges with two competitors	3	0
Exchanges with three or more competitors	4	0
Tulsa WACP *		
Total number of exchanges	47	47
Exchanges with no competitors	46	47
Exchanges with one competitor	0	0
Exchanges with two competitors	0	0
Exchanges with three or more competitors	1	0
* See also, <i>Appendix A, Maps</i>		

2. Mass Market Definition

Analysis: The FCC seeks comment on how to best define customer classes for “impairment” determinations. Customers with less than ten lines should be considered “mass market” customers and customers with ten or more lines should be considered “enterprise market” customers.

The Oklahoma Commission considered the recurring and non-recurring costs that CLECs pay an incumbent to provide DS-0 and DS-1 services. *Reference:* Exhibit 2, Testimony of Marilyn Anderson, page 2, lines 6 – 12. Simply put, it costs a CLEC less to provide a customer with a DS-0 line than it would cost to provide the same customer with a DS-1 line. Typically, the large “enterprise market” customer will purchase one or more DS-1 lines to service phone banks and data services. The CLEC recovers its expense for provisioning a DS-1 line by charging for a greater number of individual phone lines purchased by the customer. On the other hand, individuals and small business “mass market” customers will typically purchase several DS-0 lines, rather than purchase a more costly DS-1. For example, a typical lawyer’s office, doctor’s office, or similar small business might have four voice lines, a dedicated fax line, and line with dedicated internet access, six lines altogether.

The point of economic indifference between providing several DS-0 lines and a single DS-1 line is the appropriate demarcation to differentiate mass market customers

and enterprise market customers. The Oklahoma Commission adopted a mathematical model using weighted averages to determine the point at which the cost of providing several DS-0 lines was equal to the cost of providing one DS-1 line. The calculations used by the Oklahoma Commission are explained in greater detail in Exhibit 1, Testimony of Marilyn Anderson, pages 5 - 8

Facts and Statistics:

In making its determination of the appropriate point of economic indifference in the cost of provisioning several DS-0 lines versus a single DS-1 line, Staff was required to make some assumptions. First, monthly recurring costs were established by referencing the UNE Schedule of Prices for the standard Oklahoma Interconnection Agreement (“O2A”). Second, non-recurring costs were not included in the analysis due to a lack of consensus on the recovery period (SBC claimed eight years, Sprint claimed 2 years).

	Rural	Suburban	Urban
Cost of one line / month for DS-0	\$ 26.25	\$ 13.65	\$ 12.14
Cost of one line / month for DS-1	\$ 124.93	\$ 107.15	\$ 121.15
DS-1 / DS-0 Ratio	4.76	7.85	9.98
Point of Economic Indifference *	5 lines	8 lines	10 lines
Estimated Percent of lines in state	25%	15%	60%
Weighted Average Calculation:	<div>5 lines x 0.25</div> <div>8 lines x 0.15</div> <div><u>+ 10 lines x 0.60</u></div> <div>8.45 lines</div>		
Weighted Average for Point of Cost Equality = 9 lines			

D. Universal Service Considerations

“Also, we seek comment on how to respond to the D.C. Circuit’s guidance on other threshold factors, including the relationship between universal service support and UNEs.”

Reference: FCC 04-179, para. 9.

The Oklahoma Commission offers no comment on how to address the relationship between universal service support and UNEs. The Oklahoma Commission is aware that universal service requirements are a significant concern to telecommunications

carriers and that a review of the existing universal service regulatory framework is appropriate and currently underway. However, questions concerning universal service are best answered in the FCC's continuing docket on universal service, FCC-04J-2.

E. Additional Transition Mechanisms

“Are there circumstances in which particular final rules would necessitate additional transition mechanisms apart from or beyond this six-month phase? For example, we seek comment on what additional transition mechanisms, if any, would help to prevent service disruptions during cut-overs from UNE facilities to a carrier's own (or third-party) facilities, or for conversions to tariffed or other service arrangements, and would be consistent with the court's decision.”

Reference: FCC 04-179, para. 10.

The Oklahoma Commission is aware that the FCC has faced a number of unforeseen obstacles in its attempts to craft a set of final rules. The Court's ruling has provided clear directions on how the FCC may proceed without suffering additional setbacks. It is time to resolve the open issues and provide certainty to the market.

F. Commercial Agreements

“Additionally, we incorporate three petitions regarding incumbent LEC obligations to file commercial agreements, under section 252 of the Act, governing access to network elements for which there is no section 251(c)(3) unbundling obligation. To that end, should we properly treat commercially negotiated agreements for access to network elements that are not required to be unbundled pursuant to section 251(c)(3) under section 252, section 211, or other provisions of law?”

Reference: FCC 04-179, para. 13.

A commercial agreement granting a CLEC access to network elements not subject to unbundling requirements should be free from regulatory oversight by the FCC and state commissions. The role of the FCC and state commissions is to insure that CLECs have basic access to customers in all markets. Beyond that, competitors should be free to negotiate agreements amongst themselves without unnecessary regulatory intervention.

G. Additional Comments

“Moving beyond the threshold unbundling issues, we seek comment on how to apply the Commission’s unbundling framework to make determinations on access to individual network elements. Thus we seek comment, including evidence at a granular level, on which specific network elements the Commission should require incumbent LECs to make as UNEs in which specific markets, consistent with *USTA II*, and how the Commission should make these determinations. Further, we invite parties to comment on any other issues the Commission should address in light of *USTA II*.”

Reference: FCC 04-179, para. 11.

At the direction of the FCC in its Triennial Review Order, Staff conducted inquiries into the subjects of Batch Hot Cut processes, Dedicated Transport, and Competitive Wholesale Access to DS1, DS3, and Dark Fiber loops. In FCC 04-179, the FCC did not specifically request information or policy recommendations about these subjects. Therefore, the Oklahoma Commission will not burden the FCC with a lengthy analysis of each subject. The testimony of Barbara Mallet and Lillie Simon are attached as exhibits. This testimony provides a comprehensive analysis these subjects and provides data for use by FCC reviewers.

OKLAHOMA CORPORATION COMMISSION

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